RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

235 Promenade Street, Providence, RI 02908-5767 TDD 401-831-5508

June 20, 2006

TO: INTERESTED PARTIES

FROM: Alicia M. Good, P.E., Assistant Director
Office of Water Resources
Department of Environmental Management

SUBJECT: Responsiveness Summary to Comments Received on the Proposed Amendments to the Rhode Island Water Quality Regulations.

A public notice for a public hearing on the proposed amendments to the Rhode Island Water Quality Regulations was published in the Providence Journal, mailed to numerous interested parties, and posted on DEM's website on Friday November 19, 2004. A public workshop to discuss the proposed regulation amendments was held on December 9, 2004 and the public hearing was held on January 12, 2005. The Department offers the following responses to comments received during the comment period associated with the public notice of the proposed amendments.

1. ***Rule 7 Definitions***

A. Suggestion that "bathing beach" be the terminology of the definition as opposed to "designated bathing beach" because the public should be protected whether or not DEM licenses the beach.

The enterococci criteria were developed to protect all waters designated for swimming using frequency of immersion and potential for gastrointestinal effects. The frequency of immersion is assumed to be greater at bathing beaches and therefore more stringent criteria are needed at designated bathing beaches to provide the same level of protection as all other waters. Therefore, the public is protected in all waters designated for swimming use (i.e., all waters of the state).

B. The definition of Discharge does not make the distinction for "de minimus" material from dredge operations. This oversight places the material that is suspended at the dredge site under the rules discharges, which is contrary to the federal rules and therefore not in compliance with the Marine Infrastructure and Maintenance Act of 1996.

The proposed regulations included the following modification to the first footnote listed in Rule 13.A.(3).(b). "the application process and decision for the water quality review will be conducted in accordance with the Rules and Regulations for Dredging and the Management of Dredged Material". The Rules and Regulations for Dredging and the Management of Dredged Material were specifically developed to comply with the Marine Infrastructure and Maintenance Act of 1996. Additional modifications have been made in Rule 13.A.(3).(b). to clarify that the application process and decision *for the water quality review will be conducted in accordance with the Rules and Regulations for Dredging and the Management of Dredged Material.*

C. RIPDES – suggest adding "federal" before Clean Water Act.

The word "federal" has been added as suggested.

D. There is no definition of aesthetic value to support the standards "good" and "excellent" in the water classifications.

The general description and water quality criteria associated with aesthetics is found in Rule 8.D. (1).(b). Best professional judgement is used to interpret this narrative criteria. Because narrative standards are not quantitative, determining that one has been exceeded typically requires a "weight of evidence" approach to data analysis showing a relative difference in quality. We are not aware that EPA or other states have defined the difference between good and excellent aesthetic value in regulations. We anticipate that the development of tiered Aquatic Life Uses as described in DEM's Water Monitoring Strategy, may include tiered habitat descriptions that could provide some quantitative information toward the differences between good and excellent aesthetics.

2. ***Rule 8.B. – Water Use Classifications***

A. Now that drinking water use has been moved from Class A to Class AA there appears to be extremely minor differences between Class A and Class B. Need better clarification on the criteria for each classification.

The commenter is correct that currently there are only minor differences between the descriptions of Class A and Class B waters. As discussed in the state's Water Monitoring Strategy, one of the Department's goals is to define tiered Aquatic Life Uses that will establish greater precision in applying protection. It is anticipated that these tiered uses will assist in further defining Class A and Class B waters.

B. There is need for further clarification of how the new Class AA for drinking water is distinguished from Class A waters.

Under the previous Regulations, some but not all waters designated as Class A were sources of public drinking water supply. The creation of Class AA waters is to clarify which waters are part of drinking water supply systems and to afford them the protection necessary for this designated use. All waters within drinking water supply watershed boundaries have been designated Class AA.

3. ***Rule 8.B. – Brackish waters***

A. There were several comments about the proposed paragraph regarding brackish waters under Rule 8.B. Water Use Classifications. Commenters were concerned that the addition of this language was confusing as to how it interacts with the different classifications and to how brackish waters were defined for purposes of determining water use classification.

The proposed addition of this paragraph was an attempt at clarifying how brackish waters are classified under the Water Use Classification rule. The proposed language was adapted from Appendix B. Section II. Aquatic Life Criteria, which describes which of the saltwater vs freshwater criteria are to be applied in waters which meet the brackish water definition as adopted from EPA guidance. Due to the confusion this paragraph created it has been determined that it will not be included in the final regulation changes.

4. ***Rule 8B(3)(b) – SA waters that a partial use designation of SA {b} will not be considered a downgrade and will not require a UAA.***

A. The Department received comments from RIMTA and STB in agreement with the proposed language in this section. RIMTA further suggests that the partial use designation will also apply to the Marina Perimeter Limit (MPL) of all existing marinas, marina expansions, or new marinas that may be permitted by CRMC.

When the last major revisions to the RI Water Quality Regulations(WQRs) were completed (1997) the partial use designation was applied to all existing marinas and marina expansions. To date there have not been any marina expansions approved by CRMC that would require changes to the existing partial use designations. It would not be consistent with the federal Clean Water Act to automatically accept any future marina expansions or new marinas that may be approved by CRMC. Each proposal must be reviewed for compliance with the federal Clean Water Act and RI WQRs.

B. Information is not provided concerning the existing use status of these waters, and it is unclear as to whether the waters are being assigned the partial use designation or simply being identified as potential candidates. EPA requests that DEM clarify the intent and effect of the proposal.

The Department concurs that the proposed language was incorporated in a Rule where the intent may be confusing. These waters are still designated SA at this time, however the new language is to indicate that a UAA would not be required to assign a partial use designation of SA{b} to these specific areas should a request to do so occur. The proposed language has been moved to Rule 19.E., Modifications of Designated Uses where this intent should be clearer.

C. CRMC notes that new and/or revised MPLs will be approved by the Council in areas where this partial use designations will need to follow, however, there is no mechanism to recognize this. If CRMC changes the water types to Type 3 or higher can DEM change the classification in the water areas in question? Would a UAA need to be conducted?

It would not be consistent with the federal Clean Water Act to automatically accept any future marina expansions or new marinas that may be approved by CRMC. These proposals must be reviewed for compliance with the federal Clean Water Act and RI WQRs. For example, if CRMC changes existing type 1 or type 2 waters (which are currently SA waters) to Type 3 or higher, the designated/existing shellfishing use would not be protected. In accordance with the federal Clean Water Act and WQRs a Use Attainability Analysis must be conducted prior to eliminating a designated/existing use. At the present time CRMC regulations do not identify the criteria which must be met to justify changing type 1 or 2 waters to type 3 or higher. If CRMC modified their regulations to require that the same criteria stipulated in the federal Clean Water Act and WQRs are met prior to downgrading water use types, potential conflicts between CRMC regulations, the federal Clean Water Act and the WQRs would be eliminated.

D. The Department received several comments objecting to the elimination of a UAA in certain waters designated as Class SA.

The Department proposed language stating that it is not considered a downgrade and a UAA is not required to modify the classification of four Class SA waters that have a CRMC type designation of 3 or higher, to Class SA{b}. The purpose of this proposed change is to bring consistency to the management of these waters in terms of the DEM and CRMC regulations regarding waters where new marinas may be feasible.

E. The Department received several comments in support of the partial use designation of SA{b} for the waters listed to coordinate with CRMC's Water Types.

No response required.

F. Section 8.B (3)(b)ii should read "Warwick Neck" not "Warwick Point".

This change has been made.

5. ***Rule 8.C. – Water Quality Classifications***

A. One commenter questioned the regulation to classify all tributaries of Class B streams as Class B themselves. They included a list of 14 lakes and rivers in the Wood/Pawcatuck watershed that should be classified as Class A (from Class B) because they have excellent water quality, aesthetic value and provide exceptional habitat for native brook trout.

Not <u>all</u> waters tributary to Class B waters are by default classified as B. In accordance with Rule 8.C., only waters <u>not</u> listed in Appendix A follow that general rule to determine the water quality classification. In accordance with Rule 19.E.2., the Director shall hold a Public Hearing upon receipt of a meritorious request to upgrade the class of a water quality segment where current water use classifications specify water uses less sensitive than those which are presently being achieved. Additional information is needed to make this determination for the commenter's request. The Department will work with the commenter on gathering the necessary information.

6. ***Rule 8.D(1). – Water Quality Criteria – General Criteria***

A. The term "adversely affect" should be defined as it is a water quality criteria that is left to professional judgement.

Since numerous site specific and project specific factors must be considered, it is important that the term adversely affect remain as a narrative standard that is interpreted by professional judgement, especially for interactions of affects. The Water Quality Regulations contain water quality criteria and antidegradation provisions that define and protect against adverse affects.

B. Flow should be included in the water quality criteria. In order to support biological integrity, a flow value or range (physical integrity) should be developed. Since these are narrative criteria, perhaps language under a created paragraph "h" about "adequate flow to maintain the biological integrity of the water body" could be developed.

Language has been modified under Rule 8.D. to incorporate this suggestion.

C. A request was made that "Mixing Zones" be restricted to those currently in use, and that pollutants that persist for periods of time – greater than one year – be prohibited from currently used mixing zones.

Rule 8.D.(1).(g).iv. currently requires that mixing zones must "Not allow substances to accumulate in sediments, fish and wildlife or food chains such that known or predicted safe exposure levels for the health of humans or fish and wildlife will be exceeded." In order to incorporate this specific request the Department needs to develop a procedure to identify persistent pollutants that would accumulate regardless of site specific conditions. The Department will consider the request, investigate the issue further and evaluate the need for revisions at a later date.

7. ***Class AA Waters***

A. Language needs to be amended to delete fish habitat and recreational uses from Class AA waters. There is concern that the inclusion of fish habitat and recreation in Class AA waters, without any clarification and exemptions for existing drinking water uses, will result in conflict.

The Clean Water Act requires that all waters be designated to support fish and wildlife and their habitat, fish consumption, and recreational uses. The Water Quality Regulations have incorporated these beneficial uses and the requirement of water quality conditions that will support these uses, to all waters of the state. However, Rule 8.B.(1). notes that waters also designated for public drinking water supply (i.e., Class AA), may be subject to restricted recreational use by State and local authorities.

B. The fecal coliform criteria for drinking water use should be extended beyond the terminal reservoir to include upstream reservoirs and tributaries.

There are no federal bacteria/pathogen criteria for drinking water use. The Safe Drinking Water Act assumes treatment will remove all bacteria from the source water. The DEM worked with HEALTH's Drinking Water Quality program to develop this criterion for source water protection. The inclusion of a drinking water fecal coliform criteria at the terminal reservoir, where the intake pipes are located, has been determined to be an additional source of protection and assurance that excessive treatment for bacteria will not be required. The bacteria criteria for recreational uses are applied at all other locations (upstream of the terminal reservoir) of the drinking water supply system. Additional protection is found in the antidegradation provisions of the Regulations which restrict incremental changes in water quality and as noted in Rule 9.A., upstream conditions cannot affect downstream standards (criteria and uses).

C. Several comments were received commending the new AA classification along with notation that the new AA classification for waters designated as public drinking water supplies will better guide management to maintain the health and availability of clean water supplies for all Rhode Islanders.

The Department concurs.

D. Confirmation was requested that the waters proposed to remain classified as Class A were not and are not public drinking water supplies.

All of the waters proposed to remain as Class A were not and are not part of a public drinking water supply system.

8. ***Enterococci criteria***

A. Concurrent with the initiation of the public comment period on the WQRs, EPA issued a final promulgation of enterococci criteria for the State of RI. Furthermore, in April 2006, EPA drafted Technical Fact Sheets on the Implementation of Bacteria Criteria. The documents further clarified the appropriate use of risk levels when determining the geometric mean criteria applicable to freshwaters and that single sample maximum criteria should be used for beach notification and closure decisions. The following changes have been made to the final regulations:

The geometric mean applicable to freshwaters (other than designated beaches) has been changed from 33 to 54 colonies/100 ml. EPA considers these criteria to be equally protective of human health.

The single sample maximum has been removed for fresh and salt waters that are not designated beaches.

B. To ensure that use of fecal coliform in lieu of enterococci does not persist indefinitely, DEM should provide documentation that demonstrates a commitment to begin collecting data for enterococci for all coastal waters designated for primary contact recreation.

Rhode Island's Water Monitoring Strategy documents the Department's commitment to filling data gaps. The Department anticipates phasing in enterococci sampling in coastal waters based on frequency of primary contact recreation. As the commenter noted, enterococci are presently being collected at designated bathing beaches. As noted in the

Monitoring Strategy, DEM is currently seeking funding to conduct a rotating assessment of coastal areas and if implemented would incorporate sampling for enterococci. Sampling in the more open waters would follow. While funding needs for enterococci sampling is outlined in the initial estimates of the coastal assessment costs within the Monitoring Strategy, full costs to implement data collection for all waters has yet to be estimated but will be done as the program proceeds. For freshwaters, some samples collected in the Wood River basin as part of the 2004 rotating basin pilot project and all samples collected in the Pawcatuck River basin as part of the 2005 rotating basin project, were analyzed for enterococci.

C. The term "except as naturally occurs" is indistinct. Waterfowl may contribute a large amount of fecal coliform and they are natural. Efforts should be made to move non-compliant waters towards the standards even if it is caused by waterfowl.

The Department concurs, but also recognizes that ultimately a use attainability analysis may be necessary to address water bodies impacted by waterfowl or wildlife. The term "except as naturally occurs" has been removed from the freshwater and saltwater fecal coliform and enterococci primary contact recreational/swimming criteria in Table 1.

D. In Tables 2 and 3 the geometric mean enterococci criterion is stated as "steady state". We seek clarification as to DEM's intended meaning of that language. It is important that the criteria are applicable during wet and dry weather.

The term "steady state geometric mean" was taken directly from EPA's 1986 Ambient Water Quality Criteria for Bacteria guidance document. When EPA published the final rule in November 2004, the term "steady state geometric mean" was dropped. The Department has removed this term from the final enterococci criteria.

9. ***Rule 8, Table 2 – Class-Specific Criteria – Sea Water***

A. Under the nutrient criteria, how will nuisance algae be monitored and what is the threshold for tolerance?

The basis of the saltwater nutrient criteria is elevated concentrations associated with cultural eutrophication as defined in Rule 7 of the Water Quality Regulations. This is a narrative standard that is evaluated on a case-by-case basis. The Department is interested in developing a strategy to map macroalgae, which is the type of algae associated with many nuisance complaints. The Department in conjunction with the URI and NBEP initiated a pilot project in the summer 2005 to test mapping methods which in the future might be applied to develop a quantitative standard and to be the basis of a sustained monitoring program. This issue was discussed by the RIEMC and preliminary discussions led to the pilot project. The RIEMC will work to define a long-term strategy for all coastal waters.

10. ***Freshwater Dissolved Oxygen Criteria***

A. What does "except as naturally occurs" really mean? Do you mean where waters in their natural state have DO levels below 75% saturation? What criteria will be used to

determine that the natural state of waters is below 75% saturation? At what depth does this standard apply?

Naturally occurring means natural loadings of nutrients and natural environmental conditions – without anthropogenic effects. Natural conditions are determined by use of a reference station or through water quality modeling predictions of loadings that represent natural conditions (prior to human influence). The freshwater DO criteria apply throughout the water column.

11. ***Saltwater Dissolved Oxygen Criteria***

A. *A technical error in the formula for waters without a seasonal pycnocline has been corrected. This correction necessitated changes to Table 3.B and Figure 3.C.*

B. Need clarification on how the new DO standard will be applied to applications for Water Quality Certifications, permits, dredging, new marinas/marina expansions and baseline monitoring. Several comments were made against adoption of the criteria because it cannot be easily understood nor is clear on how it can be applied.

The proposed saltwater dissolved criteria are consistent with best available scientific data and guidance from EPA (EPA-822-R-00-012). DEM is working with EPA on the refinement of a computer model that evaluates DO data against the new criteria. Implementation of the DO criteria for activities and permits is conducted on a case-by-case basis.

C. The exemption from the standard for "natural conditions" needs more careful review. Concerned there may not be adequate protection where "natural conditions" have long been impacted by organic sediments from human sources.

Areas that have long been impacted by organic sediments from human sources would not be considered natural conditions. These areas would be evaluated based on models of non-impacted sediments or a reference site.

D. It was suggested that a minimum DO value for permit limit derivation be included in the DO criteria.

It is not appropriate to establish a different water quality criterion for permit limit derivation. Permit limits are established based on available science, guidance from EPA and best professional judgment. On a case-by-case basis, applicants for permits are required to demonstrate compliance with the criteria.

E. It was suggested that the current saltwater DO criteria be maintained for areas where that criteria is already attained.

Water quality criteria are based on the impacts to aquatic life and human health. It is not appropriate to establish water quality criteria based on current level of attainment. This issue is addressed by the antidegradation rules, which protect existing uses and high quality waters.

F. A standard of low mortality should be set so that remedies may be sought and applied to assure good fish and shellfish reproduction.

The DO criteria was established using a method that estimates how many days a given DO concentration can be tolerated without causing unacceptable effects on total larval survival for the entire recruitment season. The level of impairment due to low DO, to cumulative seasonal larval recruitment that has been selected as acceptable by the DEM Division of Fish and Wildlife, is 5%. Additional language has been added to the DO criteria to clarify that a more stringent larval recruitment impairment value may be established on a site specific basis in accordance with Rule 19.F.

G. While DEM's proposed use of a 5% effect on larval recruitment is consistent with EPA's saltwater DO guidance, there is information regarding entrainment issues for power plant cooling water intakes where smaller percent impacts on larval recruitment may have been determined to be significant.

In accordance with EPA's guidance, the Department proposed a 5% impairment on larval recruitment. Additional language has been added to the DO criteria to clarify that a more stringent larval recruitment impairment value may be established on a site specific basis.

H. It appears that Table 3, section I is indicating that for surface waters above a seasonal pycnocline, the acceptable duration for the DO to fall below 4.8 mg/l is a very short period, such as an instant rather that for a duration of hours or days. Please confirm or clarify.

As noted in the text in Table 3, section I, for waters above a seasonal pycnocline: 4.8 mg/l is an instantaneous value that DO can't fall below more than once every three years. This language is consistent with the EPA saltwater DO criteria.

I. DEM should clarify how it will address any cumulative effect of possible hypoxia on recruitment outside of May 1 through October 31, unless DEM is aware that either: 1) a pycnocline is not expected to occur outside of that time frame, or 2) hypoxia is rare and inconsequential before and after that period.

Dissolved oxygen sampling conducted by DEM and other organizations in Narragansett Bay has shown that pycnoclines do not tend to occur outside of this time frame and that hypoxia is rare and inconsequential before and after that period.

J. How will the state conduct baseline monitoring for the new DO criteria? Perhaps that Rhode Island Environmental Monitoring Collaborative could be involved.

DEM along with a number of partners have an existing fixed station monitoring system of approximately 13 buoys within Narragansett Bay. The fixed-stations collect data continuously which DEM believes is essential to applying the new DO criteria. In addition, a number of organizations and agencies have participated in volunteer-based

surveys of low DO conditions around the Bay for the past five years. During roughly this same period, NOAA has conducted monthly trawls of the Bay collecting, among other parameters, dissolved oxygen data. The Department is working with a consultant and EPA to evaluate these DO data sets to determine the spatial representation of the data collected at the buoys. This project will also evaluate the current placement of the buoys and propose relocation as necessary to optimize the data collected. DEM is a member of the Rhode Island Environmental Monitoring Collaborative and will review any proposed changes to the DO monitoring strategy with the group.

12. ***Rule 8.E – Applicable Conditions***

A. What constitutes "most adverse conditions"? The period of time alluded to in the WQRs to determine these conditions are unclear, even though this determination is needed for the antidegradation analysis.

The language in Rule 8.E. has been changed to clarify that adverse conditions consist of the conditions listed in Rule 8.E.(1), and in some situations are determined on a case-by-case basis using sound engineering and scientific practices.

B. DEM has proposed to revise the stream flow used for application of human health criteria for non-carcinogens from the 30Q5 low flow to the long term harmonic mean consistent with EPA guidance. DEM should also consider revising the language associated with that flow to indicate that it is the flow *at* which the criteria are applied. This is more accurate than the current wording that the criteria are applicable *at or in excess of* the harmonic mean flow.

The Department has considered the comment and decided to maintain the language as noticed.

13. ***Rule 11.F. – Prohibited Discharges – Discharges of Sewage from Vessels***

A. Section 11.F.2 should state that discharge from vessels into the waters of the state be prohibited since all of Narragansett Bay is a "no discharge zone".

On August 10, 1998 RI coastal waters, including territorial seas within three miles of shore and all of Narragansett Bay were designated as a No Discharge Area (NDA). A No Discharge Area is a designated body of water in which the discharge of treated *and* untreated *boat sewage is prohibited (this does not include greywater or sink water). This designated was provided pursuant to 40CFR§ 140.4 which stipulates that: "a State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into some or all of the waters within such State by making a written application to the Administrator, Environmental Protection Agency, and by receiving the Administrator's affirmative determination pursuant to section 312(f)(3) of the Act."*

In addition, pursuant to 40CFR 140.3(a)(1) the discharge of treated and untreated boat sewage is prohibited in: freshwater lakes, reservoirs and other freshwater impoundments where inlets or outlets prevent ingress or egress of vessels subject to 40CFR140 and rivers that are not capable of navigation by interstate vessel traffic subject to 40CFR140. However, pursuant to 40CFR140.3(a)(2) discharge of boat sewage from Coast Guard-

certified marine sanitation devices is allowed in freshwater lakes and impoundments accessible through locks, and other flowing waters that are navigable by interstate vessels subject to the regulation. Vessels subject to 40CFR140 are defined in § 140.1 (d) Vessel includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on waters of the United States;.

Since there are no freshwaters in RI that are subject to part 40CFR140.3(a)(2) and all coastal waters have been designated as a no discharge zone the discharge of sewage from vessels is prohibited in all waters of the state. Section 11.F.1, 3 and 4 have been revised to reflect this prohibition and section 11.F.2 has been deleted.

14. ***Rule 13A(3) –Approvals - Water Quality Certifications (WQC)***

A. Oppose elimination of review of commercial, industrial, state or municipal land development projects that are less than 40,000 ft^2 of impervious area. Saugatucket Coalition proposed to change it to developments with 20,000 ft^2 or less of impervious surface instead.

This particular modifications was proposed to ensure that limited state resources for the review of water quality impacts were directed to the more significant sources. Projects below the proposed thresholds must still utilize best management practices and their storm water must not result in a violation of water quality standards. The threshold of 40,000 ft^2 was selected to be consistent with CRMC requirements.

B. Flow alterations require a WQC unless the property owner is a farmer. The proposed regulations do not specify what actions or activities of a public drinking water supplier will require a WQC. Drinking water suppliers should be exempt similar to farmers, or there needs to be specific language to ensure that in the case of conflict, operation of a public drinking water supply would have governing use.

Under the requirements of the existing Water Quality Regulations, a separate application for a WQC is not required for projects which are under review by certain programs within the Department (the review is coordinated internally) For example, when the property owner is a farmer, the application for flow alterations to freshwater wetlands are submitted to the Division of Agriculture. However, agricultural irrigation is not exempt from the requirements Water Quality Regulations or the Federal Clean Water Act The second footnote in Rule 13.a.3.b confirms that the Water Quality Certification review, for flow alterations associated with agricultural irrigation will be managed through coordination with the Division of Agriculture. Furthermore, it would be a violation of the Federal Clean Water Act to add language that in the case of conflict, any one use would govern even if another designate use would be lost.

C. Language needs to be retained which will ensure separate reviews by RIDEM staff for projects that require a WQC along with another RIDEM permit. (The WQC should be evaluated by the person who is responsible for the WQC program within DEM even though it is included in the permit of another office.)

It is the Department's responsibility to ensure that reviews for compliance with the Water Quality Regulations are conducted in a consistent manner and to maximize the efficiency of available resources. It would be inappropriate to stipulate in regulation that

individuals from various programs cannot be cross-trained to perform water quality reviews.

D. Objection to the public notice being revoked under the general WQ Certification.

Public notice requirements for Water Quality Certifications that were previously listed in Rule 13.B have been relocated to Rule 15.D. In addition, some modifications to the public notification procedures were proposed, but the public notification requirement was not eliminated.

E. Several commenters noted confusion over the language for dredging projects. Will DEM still do WQC's or do all projects go to CRMC for purposes of marine dredging?

DEM will continue to review dredging projects for compliance with water quality standards. Additional modifications have been made to the footnotes listed in Rule 13.A.(3).(b). to clarify that the application process and decision for the water quality review will be conducted in accordance with the Rules and Regulations for Dredging and the Management of Dredged Material.

F. Rule 13A.(3).(c). states that marine dredging and dredge material disposal permits shall incorporate the WQC. There have been some issues with this coordination and this language does not clear up the issues between the two programs. It is also not clear how the proposed rules comply with the requirements of the Marine Infrastructure and Maintenance Act of 1996.

The proposed regulations included the following modification to the first footnote listed in Rule 13.A.(3).(b).: "the ***application requirements and decision*** *for the water quality review will be conducted in accordance with the Rules and Regulations for Dredging and the Management of Dredged Material and if the application for the project or activity is approved, such approval shall constitute the WQC." Additional modifications have been made to the footnotes listed in Rule 13.a.3.b. to clarify that the "****application process and decision*** *for the water quality review will be conducted in accordance with the Rules and Regulations for Dredging and the Management of Dredged Material" and to delete the remainder of the sentence. The Rules and Regulations for Dredging and the Management of Dredged Material were specifically developed to comply with the Marine Infrastructure and Maintenance Act of 1996.*

15. Rule 15 – Procedures for Review of Applications for Orders of Approval and Water Quality Certifications.

A. There should be a fixed time between submittal, review for completeness and start of the public notice. Language should be added to reflect the requirements in section 13.3.1 of the Dredge Regulations to require DEM to complete its review and forward a decision to the applicant within 180 days of determining the application is complete and that DEM should determine whether the application is complete within 60 days from the date the application is received by DEM.

As noted above, Rule 13.A.(3).(b). has been modified to clarify that the application process and decision for the water quality review will be conducted in accordance with the Rules and Regulations for Dredging and the Management of Dredged Material.

B. RIMTA notes that DEM should not require a public notice of dredging activities that involve 10,000 yd^3 or less of dredged material, consistent with CRMC and ACOE.

Public notice of dredging activities will be conducted in accordance with the requirements of the joint DEM/CRMC regulations: Rules and Regulations for Dredging and the Management of Dredged Material.

C. The Regulations must be consistent with the Marine Infrastructure Act of 1996 and therefore the Water Quality Regulations must be amended to be consistent with the federal rules. The Water Quality Regulations should address the issues of resuspension and the use silt curtains.

As noted above, additional modifications have been made to the Water Quality Regulations to clarify that the application process and decision *for the water quality review will be conducted in accordance with the Rules and Regulations for Dredging and the Management of Dredged Material ("Dredging Regulations") which were developed in response to the Marine Infrastructure Act of 1996. After the draft WQRs were made available for public comment, DEM developed a draft policy regarding the use of silt curtains that is applied when dredging projects are reviewed under the Dredging Regulations.*

D. The draft WQRs note that where the WQC determination is to be incorporated with another DEM permit decision, the corresponding Public Notice requirements and appeal procedures contained in the regulations of the associated permit program will apply. However the draft Regulations do not state what the public notice requirements will be for projects that go under CRMC for review.

In this case the public notice requirements found in Rule 15 of the WQRs, "Procedures for Review of Applications for Orders of Approval and Water Quality Certifications", would apply.

E. Is there a provision in the WQRs to ensure that projects before CRMC that would not require a public notice if located within DEM's Freshwater Wetlands Program jurisdiction do not require a public notice prior to issuance of a WQC determination. That is no WQC and public notice for US Army Corps of Engineers Programatic General Permit (PGP) projects, those issued insignificant Alteration Permits and Applications to Alter Freshwater Wetlands which do not require individual WQC applications. This results in public notice for projects under CRMC review that would not receive a public notice if under DEM jurisdiction.

The list of projects under CRMC review that require a WQC application and public notice represent those with the greatest potential for impacts and majority of these would require a public notice by CRMC. Therefore, it should be a rare occurrence that the project would be public noticed only due to the WQC application process. Please note

that while all PGP projects do not require separate public notice by the CORPS, certain require notice by CRMC or DEM Freshwater Wetlands.

F. There are circumstances when DEM combines the WQC review with a Freshwater Wetlands application that does not require a 30 day public comment period and as such a public comment period regarding the water quality impacts is not required. Is there a mechanism to do the same when the WQC is the only DEM review required and the wetlands review by CRMC is of a type that would not required public notice if it was submitted to DEM Freshwater Wetlands?

As drafted, there are situations where public notice requirements are more stringent for projects under CRMC coastal wetlands review that are determine to have insignificant impacts. The list of projects under CRMC review that require a WQC was narrowed down to those with the greatest potential for water quality impacts to reduce possible inconsistencies. It is DEM's position that modifying the WQRs to eliminate the need for public notice of projects that CRMC determines would not have significant impacts would make the permitting process more unpredictable.

G. Language needs to be included which will require written notification to drinking water suppliers of all WQC applications.

Requests for notification by public drinking water suppliers will be considered under Rule 15.D.(1) which includes the provision that public notice will be provided to any other such persons, agencies or organizations deemed appropriate by the Director.

H. The language in the WQRs should be modified to correctly reference the stormwater design manual, and include water supply system management plans into section 15.A. Additionally, if applications concerning projects are located on the watersheds of a public drinking water supply, the water supplier's Water Supply System Management Plan should be consulted during RIDEM's review process.

The reference to the stormwater design manual has been corrected. It would not be appropriate to reference water supply system management plans as guidance documents that DEM will use to evaluate compliance with the WQRs.

I. With the interest of all stakeholders in mind and the requirements of 40 CFR §121.23, the WQRs should require public notice of applications for WQCs be provided in a paper of general circulation.

In accordance with the draft Rule 15.D.(1). where the Director determines the project has the potential to result in impacts beyond the abutting property(ies) notice shall be published in a daily or weekly newspaper with circulation in the involved area. This is consistent with 40 CFR §121.23 which states that "… or may provided such notice in a newspaper of general circulation in the area in which the activity is proposed to be conducted if the Regional Administrator deems mailed notice to be impracticable". In accordance with Rule 13A.(3).(c)., when the WQC decision is incorporated with one of the listed permit decisions, the corresponding public notice requirements will be followed in lieu of those contained in Rule 15. However, when the activity is subject to Rule

13.A.(3).(a), (e.g. requires a CWA Section 401 water quality certification) and the listed permit decision does not require public notification, the requirements of Rule 15 will be applied.

J. Rule 15.D.(1). should state that the Director **will** provide notice to all parties that have requested notices of WQ Certification applications.

Requests for notification will be considered under Rule 15.D.(1) which includes the provision that public notice will be provided to any other such persons, agencies or organizations deemed appropriate by the Director.

K. In Rule 15.D.(3). the language should be changed from "may" to "shall" in that "The Director **shall** provide an opportunity for oral comments…..".

The requested change has been made.

16. Rule 20 – Variances

A. Language needs to be included which will require written notification to drinking water suppliers of all variances.

Rule 20.D. indicates that variances may be granted only after public comment and hearing in accordance with RI General Laws 42-35. In accordance with RI General Laws 42-35, "The notice shall be mailed to all persons who have made timely request of the agency for advance notice of its rule-making proceedings…".

17. *Rule 21 – Appeals*

A. Section 21.B.(3) should be amended to require written notification to public drinking water suppliers of Administrative Hearings.

Rule 21.B.(3). lists the individuals (including those notified in accordance with Rule 15.D.(1)), that AAD shall notify (via first class mail) when a hearing has been scheduled. Requests for notification by public drinking water suppliers will be considered under Rule 15.D.(1) which includes the provision that public notice will be provided to any other such persons, agencies or organizations deemed appropriate by the Director.

B. This rule should be amended to provide for an appeal by a non-applicant, specifically members of the public who submitted comments during the designated comment period.

The Department seeks comments from a broad range of concerned parties however, appeals will be accepted by applicants only. There may be other avenues for non-applicants to appeal decisions.

18. *Rule 22 - Sampling*

A. Suggest adding to Rule 22.B the EPA Protocol *Assessing Chemical Contaminant Data for Use in Fish Advisories* (EPA 823-R-95-007).

This EPA guidance pertains to fish tissue sampling protocol and consumption advisories that are regulated by the Rhode Island Department of Health and therefore not appropriate for these regulations.

19. *Appendix A – Water Quality Classification Descriptions*

A. Two waterbody segments are proposed to be reclassified from SA to SA{b}. DEM should provide a statement that, in addition to the evidence that the marinas/mooring fields date back to 7/4/79, DEM believes the same is true back to 11/28/75 and the reclassification does not result in a loss of existing use.

The Department has reviewed available information and does believe that the marinas/mooring fields date back to 11/28/75 and therefore, do not result in loss of an "existing use".

B. Waterbody ID# RI0004009L-01A, Turners Reservoir, is not highlighted as being reclassified, but appears to be changed from Class B to Class B1. Please clarify.

This northern portion of Turners Reservoir is also know as Central Pond. As listed in the previous regulations the classification was B1 so this is not a change.

C. There are revisions proposed to segment descriptions of several waterbodies without explanation. Would any waters change classification as a result of these revisions?

None of the segment description changes result in a change of water classification. The changes are for clarification of a description, better GIS estimation of size, incorporation of new buoy numbers, and/or coordination with shellfish closure area descriptions.

D. Several waterbody segments do not appear in the proposed revisions. DEM should confirm that these waters were incorporated into other segment descriptions as a function of the new waterbody IDs, or remain classified by DEM's default provisions at Rule 8.C and that no waters would be reclassified.

Five of the waterbodies the commenter mentioned (Seven Mile River, Five Mile River, Blackmore Brook, Mary Brown Brook and Wetstone Brook) are located in Massachusetts or Connecticut and therefore, were removed from the RI WQRs. Waterman Pond is listed in Appendix A as WBID#RI00050011L-02. Little Grass Pond was not included in the draft as a decision to only list ponds that are greater than 10 acres in size and use Rule 8.C. to determine the classification of the waters not listed in Appendix A. However, at the request of the commenter, Little Grass Pond has been included. No classification changes were made to either Waterman Pond nor Little Grass Pond.

20. *Appendix B – Water Quality Criteria for Toxic Pollutants*

A. DEM and HEALTH should work more closely to amend the state drinking water action level for copper downward (from 1.3 mg/l) to assist in maintaining compliance with copper discharges to receiving waters. (Field's Point's local limit for Cu limit is 1.2 mg/l) As currently written, the Drinking Water Regulations may allow potable water suppliers to exceed NBC local limits simply by discharging tap water to the sewer. Similar results are found for lead and cadmium levels in tap water relative to the water quality criteria.

The Department has required that RIPDES permitees evaluate the impact of the water supply and distribution system on their ability to comply with effluent limits. DEM has worked with the Department of Health to ensure that buffering systems were implemented to meet drinking water standards. DEM will forward this comment to the Department of Health to consider further reductions to mitigate effluent compliance problems.

B. Request for DEM to maintain the Hg human health criteria until DEM has a comprehensive fish tissue monitoring program implemented for the state.

The mercury human health criteria has been maintained in the regulations.

C. For saltwater criteria, what is "ambient human health criteria"?

Ambient refers to the fact that these criteria apply to the in-stream water column – they are acceptable water concentrations. Often there is confusion that these human health criteria apply to another media such fish tissue.

D. DEM should allow for the future use of the Biotic Ligand Model for silver, currently under review by the USEPA, as the method for determining the water quality standard for silver. The silver BLM would replace the overly conservative WER method.

When EPA finalizes their guidance on this method the Department will review it and determine whether to make an allowance under these regulations.

21. ***Appendix C – Antidegradation Implementation Policy***

A. Several commenters were concerned that a public notice should be provided for projects, which cause an insignificant impact on water quality.

As noted in the EPA document entitled Water Quality Guidance for the Great Lakes System: Supplementary Information Document (SID.); "For non-BCCs, States and Tribes may include de minimis provisions in their antidegradation policy at their discretion. De minimis provisions provide a means for States and Tribes to differentiate between actions that will result in an increased loading of a pollutant to a receiving water that is likely to have a significant impact on water quality and those that are unlikely to do so and focus review efforts on actions that will degrade water quality." Several states have developed antidegradation policies, which do not require public notification of de minimis or insignificant changes in water quality. The Department will continue to research this issue in the future. However in the interest of moving forward with finalization of the draft WQR revisions, the Department will require public notice of insignificant changes in water quality.

B. CLF believes that adoption of a 20% minimum as the threshold to exempt projects from the socio-economic analysis does not meet the requirements dictated by 40 CFR 131.12.

When the change in water quality from a proposed activity is insignificant, EPA has determined that it is not necessary to demonstrate that lowering water quality is necessary to accommodate important economic or social development. This position is expressed in guidance produced by Region I (Region I Guidance for Antidegradation Policy Implementation for High Quality Waters March 10, 1987) and the EPA Office of Water (Water Quality Guidance for the Great Lakes System: Supplementary Information Document, March 1995). Both of these documents indicate that such provisions provide a means for States and Tribes to differentiate between actions that will result in an increased loading of a pollutant to a receiving water that is likely to have a significant impact on water quality and those that are unlikely to do so and focus review efforts on actions that will degrade water quality. More specifically, in comments submitted on the draft WQRs, EPA Region I stated that the 20% this threshold may be used to exempt projects from the soci-economic analysis requirements of 40 CFR 131.12, if the state regulations provide public participation on tentative decisions that a proposed lowering of high quality water is insignificant and included a case by case review that would allow any lowering of water quality to be considered significant. With the decision not to remove reference to pubic notice of insignificant lowering of water quality, the WQRs meet the requirements for use of the 20% threshold.

C. CLF believes the Department's methodology for determining existing water quality conditions and whether a project will violate the antidegradation provisions, is "based on decisions that are arbitrary, capricious and characterized by abuse of discretion and clearly unwarranted exercise of discretion". They state that the Regulations must describe the methodology for assessing instream water quality and what constitutes "most adverse conditions".

Application of water quality standards, including in the application of the Antidegradation Policy, is governed by the Requirements of Rule8.D. Since numerous site specific and project specific factors must be considered to establish most adverse conditions, it is important that the regulations allow interpretation by professional judgment.

22. Appendix D – Special Resource Protection Waters (SRPWs)

A. Several comments were received supporting the inclusion of portions of Fisherville Brook, Queens River and Sakonnet River as SRPWs.

No response required.

B. A request was submitted to add Cocumscussoc Brook to the SRPW list, noting that it is one of North Kingstown's most pristine watersheds and a state park.

In accordance with Rule 19.E.2., the Director shall hold a Public Hearing upon receipt of a meritorious request to designate a waterbody as a Special Resource Protection

Water (SRPW). Additional information is needed to make this determination for the request. The Department will work with the commenter on gathering the necessary information.

23. ***General Comments***

A. Are there any recommendations in the Greenwich Bay SAM Plan which would require amendments to the WQRs? DEM should evaluate the GBSAMP for consistency and establish a process to ensure water classes are consistent with any future recommendations in the Metro SAMP.

DEM was an active technical advisory member of the SAMP and DEM is not aware of any recommendation in the final GBSAMP that necessitate revision of the Rhode Island Water Quality Regulations. DEM will also work with CRMC during the development of the Metro Bay SAMP.